

Navigation and the incidents to navigation:



Common questions about the public's right to access.

This fact sheet is designed to help people understand the state law for accessing lakes and streams in Wisconsin for boating, swimming, hunting, fishing and other public interests¹.

State law

The Northwest Ordinance of 1787 and the state constitution in 1848 provide that navigable waters are held in the public trust and are common highways. While early common law focused on whether or not a waterway was capable of floating saw-logs to market, in *Muench v. Public Service Commission*,² the Wisconsin Supreme Court said “it is no longer necessary in determining navigability of streams to establish a past history of floating logs, or other use of commercial transportation, because any stream is “navigable in fact” which is capable of floating any boat, skiff, or canoe, of the shallowest draft used for recreational purposes.”

Indeed, the *Muench* Court found that a waterway need not be navigable at all times, but only on “a regularly recurring basis, such as during spring runoff periods.” In a later case called *Klingeisen v. DNR*³, the Court found that the public trust also applies to artificial navigable waters that are “directly and inseparably connected with natural, navigable waters.”

As the test for navigability evolved over time, so did the concept of what constitutes a public purpose. Initially, public rights were limited to navigation and fishing. In *Diana Shooting Club v. Hustung*⁴, the Wisconsin Supreme Court expanded the concept of public rights in navigable waters. The court held that navigable waters “should be free to all for commerce, for travel, for recreation, and also for hunting and fishing, which are now mainly certain forms of recreation.”⁵ (But because landowners hold title to beds of adjacent *streams* (not lakes), you need their permission to place or anchor traps, duck decoys, duck blinds, etc. on streambeds.) Public rights now include not only recreation, but also natural beauty, the prevention of pollution, the protection of water quality, and the protection of shorelands and wetlands.

¹ This fact sheet does not reflect and should not be utilized to determine the state's regulatory jurisdiction over waterbodies under Chs. 30 and 281, Wis. Stats.

² *Muench v. Public Service Commission*, 261 Wis. 492, 506 (1952).

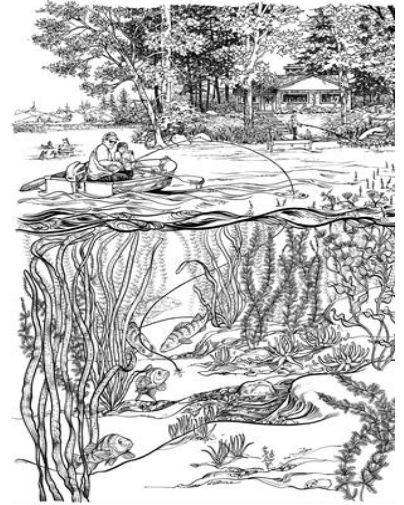
³ *Klingeisen v. DNR*, 163 Wis. 2d 921, 929 (Ct. App. 1991).

⁴ *Diana Shooting Club v. Hustung*, 156 Wis. 261 (1914)

⁵ *Diana Shooting Club v. Hustung*, 156 Wis. 261, 271 (1914)

What are the public's rights to navigation?

Everyone has the right to use public water bodies to swim, boat, or walk as long as they “keep their feet wet.” While you must gain access through legal means, anyone may recreate in a public water body provided you stay in the water. If you reach an obstruction (downed tree, bridge, culvert, etc.) in a stream, you have a right to exit the water and enter the exposed stream bed between the water's edge and OHWM as needed to bypass the obstruction.⁶ No statutes or court cases have expressly stated that the public has such a right on a lake or that the public has a right to enter above the OHWM of a waterbody as needed to bypass an obstruction.



If you are a riparian, the land above the OHWM is your private domain. When the water levels drop below the OHWM, the riparian property owner has exclusive use of the exposed lake or stream bed (except as noted above). A waterfront property owner may prevent a member of the public from walking on the exposed bed of the waterway through non-structural means (fences and walls are not allowed, however temporary signs and verbal warnings are acceptable). Trespass complaints are handled through the local sheriff's department or police department.

Where is the ordinary high water mark?

In *Diana Shooting Club v. Husting*⁷, the Supreme Court defined the OHWM as "the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation or other easily recognized characteristic."

Water marks are often at various elevations, but the most permanent and prevalent marks constitute the ordinary high water mark. The OHWM does not change with temporary fluctuations in water levels, nor is it always at or near open water, as is the case with cattail marshes and bogs. The Supreme Court has ruled that the area between the water's edge and the OHWM need not be navigable to be held in the public trust.

How can I tell if I have the right to navigate on a water body?

A good general rule is that any water body that has an official name, or is shown as a water way with a solid or dashed blue line on the topographic maps and has a defined bed and bank is likely to be public. To determine if the waterway is likely a public waterbody, check a local topographic map or the department's surface water data viewer at <http://dnrm.wi.gov/imf/imf.jsp?site=SurfaceWaterViewer>. As long as access is gained legally, the public may navigate and recreate within these water bodies as long as they keep their feet wet. The public may boat, fish, hunt or conduct other incidents of navigation on unnamed water bodies if you can float from a named water body into an unnamed water body. For ponds or ditches that are located wholly on a private property and that are not connected to a named water body, the ponds or ditches are most likely for private use only unless the property owner grants you legal access. The department recommends that you err on the side of caution, so if you are uncertain whether the pond or ditch is a public water body then you should stay out until you are able to verify whether or not the water body is public and access may be gained legally.

For more information on this topic, please see <http://dnr.wi.gov/topic/fishing/questions/access.html>

⁶ Section 30.134, Wis. Stats.

⁷ *Diana Shooting Club v. Husting*, 156 Wis. 261, 272 (1914).